



**Kagiri v Kinyanjui (Environment & Land Case 13 of 2021)
[2022] KEELC 3188 (KLR) (28 April 2022) (Judgment)**

Neutral citation: [2022] KEELC 3188 (KLR)

**REPUBLIC OF KENYA
IN THE ENVIRONMENT AND LAND COURT AT NANYUKI
ENVIRONMENT & LAND CASE 13 OF 2021**

AK BOR, J

APRIL 28, 2022

BETWEEN

DAVIDSON MWANGI KAGIRI PLAINTIFF

AND

ANNE MARY KINYANJUI DEFENDANT

JUDGMENT

1. The Plaintiff filed this suit on 24/3/2016 seeking an injunction to restrain the Defendant or her agents from trespassing or interfering with his quiet and peaceful enjoyment of the portion measuring 16 acres comprised in land reference number (L.R. No.) 6234/10 where the Plaintiff has constructed a farmhouse. The Plaintiff also sought an order of vacant possession or the eviction of the Defendant from the suit land.
2. The Plaintiff averred that he was the owner of L.R. No. 6234/10 measuring approximately 99 acres and situated in Nyeri District bordering Nanyuki, which he sub-divided and created plots that he sold to third parties. He reserved a portion measuring 16 acres for himself where he constructed a farmhouse with the intention of settling there with his family.
3. The Plaintiff mentioned in the plaint that there had been previous litigation over L.R. No. 6234/10 between him and 86 other Defendants with whom he had entered into sale agreements. He filed Meru HCCC No. 011 of 1993 against the 86 Defendants and got favourable orders. The Court of Appeal in Nyeri Civil Appeal No. 6/2011 set aside the judgment of the High Court and directed that the 86 parties who had purchased plots from him were entitled to legal ownership of their respective plots and that they were to be issued titles upon payment of the necessary registration fees.
4. The Plaintiff averred that at the beginning of March, 2016 the Defendant trespassed onto his portion of land measuring 16 acres alleging that she had purchased this land from him for valuable consideration without availing any evidence to support the alleged purchase. The Plaintiff maintained that he was



a stranger to any agreement with the Defendant who he claimed had hired goons to forcefully take possession of his land. He was categorical that the earlier sale agreement which he entered into with the Defendant lapsed after the sale aborted.

5. The Plaintiff averred that the Defendant and her agents trespassed onto the suit land, threatened to harm his caretaker who was on the land and that she was planning to develop the land. He sought a permanent injunction to restrain the Defendant from dealing with his land.
6. In the Defence and Counterclaim filed in court on 17/5/2016, the Defendant averred that she was the proprietor of Plot numbers 90, 91 and 92 comprising by measurement 12 acres in total being part of L.R. No. 6324/10 following a sale agreement dated 15/4/1995. She claimed that she had possessed, utilised and occupied the land for over 23 years. She added that these 12 acres formed part of the 16 acres which the Court of Appeal decreed belonged to the Plaintiff.
7. The Defendant denied trespassing onto the Plaintiff's land and counterclaimed for a declaration that she had acquired title to Plot numbers 90, 91 and 92 totaling 12 acres and situated within L.R. No. 6324/10 by adverse possession. She sought an order of injunction to restrain the Plaintiff from dealing with the three plots and to have the Plaintiff ordered to effect a transfer of the 12 acres of land comprised in L.R. No. 6324/10 to her.
8. The hearing of this suit commenced on 1/12/2016 before Lady Justice Lucy Waithaka. The Plaintiff testified and adopted the witness statement which he had filed in court. He was the registered owner of L.R. No. 6234/10 measuring approximately 256 acres which she sub-divided into 240 plots and sold to third parties. The Defendant was not among the people whom he sold plots to earlier.
9. He stated that if the Defendant had any claim against him, she should have applied to be joined to the earlier suit being Meru HCCC No. 411 of 1993 in which all the parties whom he sold plots to participated. He added that the dispute went all the way to the Court of Appeal at Nyeri and an order was made that the 16 acres on which he had constructed a permanent house was to be registered in his name. Part of that land is what the Defendant lays claim to. He averred that the Defendant trespassed onto his land sometime in March, 2016 claiming to have bought the land from him. He pointed out that those he had entered into agreement with filed the suit in the Meru High Court.
10. The Plaintiff maintained that any purported sale of a portion of his land to the Defendant never materialised and that the sale aborted and the Defendant was notified of this fact by his advocates, who also communicated to the Defendant that he did not wish to enter into a fresh agreement with her. The Plaintiff averred that the Defendant had trespassed into his land and threatened to harm his caretaker.
11. Mr. Kagiri explained that he purchased original parcel of land measuring 512 acres with George Wamai Hinga. The land was sub-divided into two portions. After the sub-division he got parcel No. 6324/10 which is located in Nanyuki. He obtained the title deed in 2000. He sold 238 acres to 85 internally displaced persons (IDPs) in 1982 and gave them vacant possession and was left with 16 acres.
12. He wanted to sell more land in 1983 and so he entered into an agreement with the Defendant. Ole Kaparo and Mailanyi Advocates represented him in the sale transaction while Kirundi & Co. Advocates acted for the purchaser who is the Defendant in this case. He was paid a down payment of Kshs. 50,000/= and Kshs. 200,000/= was paid to the purchaser's advocate for onward transmission to his lawyers. He stated that that sum was never forwarded to his lawyers and relied on the letter dated 26/07/1993 while pointing out that that letter confirmed the fact that the sale agreement expired on 26/07/1993 and that Defendant was seeking a fresh sale agreement.
13. He stated that his advocates responded to this letter on 28/07/1993 stating that he was not willing to proceed with the sale transaction because of the conditions imposed by the Defendant. He emphasized



- that they did not enter into a fresh sale agreement and that by the completion date of 14/07/1993, the Defendant had only paid him Kshs. 50,000/= out of the agreed consideration of Kshs. 850,000/=. He denied receiving any other monies from the Defendant. He added that even if he received the sum of Kshs. 262,000/= as the Defendant claimed, it still would not have been sufficient to clear the balance of the purchase price. He denied receiving the cheque for Kshs. 200,000/= mentioned in the Defendant's documents while pointing out that this figure was not reflected in the tabulation of monies paid which the Defendant prepared and tendered in evidence.
14. He confirmed that after the letter of 28/07/1993 the Defendant's lawyer, Mr. Kirundi continued writing to him asking him if he was still proceeding with the sale transaction.
 15. He mentioned the suit he filed in Meru and the subsequent appeal at the Nyeri Court of Appeal. According to him, the Defendant must have been aware of the suit filed at the Meru High Court because he was presented in that case by Kirundi & Co. Advocates who were also the Defendant's advocates. He was categorical that the Defendant was not entitled to any land from him because the sale transaction was never completed and he never gave her possession of the land. He stated that the Defendant attempted to take possession of the land in 2016 when his caretaker informed him that someone had erected a signboard on the land. He claimed that he obtained an injunction and the Defendant never entered the land again. He found the Defendant's counterclaim strange because in his view the Defendant had neither been on the land nor had she planted any crops or put up any building on the land. According to him the Defendant only went to the land in 1993 when they entered into the sale agreement and when she went to put a sign board on the land.
 16. On cross examination, the Plaintiff confirmed that by 1993 the land was still registered jointly in his name and that of Hinga. He confirmed that the Defendant was not a stranger to him and explained that he filed the suit in Meru against the 85 IDPs for going against the agreement to give him survey fees and the fees for processing their title deeds.
 17. He relied on the valuation in the Defendant's bundle of documents and stated that the value of the land alone was Kshs. 600,000/= at Kshs. 50,000/= per acre. He could not explain how the sum of Kshs. 250,000/= over and above the Kshs. 600,000/= was arrived at. He did not complain about having the sum of Kshs. 200,000/= held by his lawyer. He could not recall receiving a banker's cheque from the Defendant drawn in his favour by Standard Chartered Bank and claimed that he was seeing the document for the first time. He conceded that special condition 3 of the sale agreement stated that the balance of the purchase price of Kshs. 600,000/= was to be paid 14 days after registration of the transfer in favour of the purchaser.
 18. The Plaintiff confirmed that the sale agreement was subject to the Law Society Conditions of sale. He did not know whether the Defendant was ever served with a completion notice. He stated that he has never consulted a Miss Nyambura from Mr. Kirundi's office nor had he tabulated the amounts he received from the Defendant in Miss Nyambura's presence. He confirmed that Gichuru & Mathenge Advocates acted for him and Mr. Hinga when they owned the land jointly. He acknowledged that certain payments were made to that firm but denied that through Kirundi & Company Advocates, the Defendant made any payments to that firm for his benefit.
 19. The Plaintiff admitted that he wrote the letter dated 30/09/1993 authorising Kirundi to pay Kshs. 8,000/= to Gichuru Mathenge. He disputed the documents showing that Nyambura had paid Mathenge Kshs. 108,000/=. He confirmed that his advocate, Mr. Owang' initially worked with Kirundi & Co. Advocates and clarified that Mr. Owang' had never represented the Defendant who he was aware was a client of Kirundi & Co. Advocates.



20. He denied that his relationship with the Defendant changed after the Court of Appeal delivered its judgment. He maintained that the suit land had always been leasehold and Land Control Board (LCB) consent was required. He claimed that he sold unsurveyed plots but had approved sub-division plans for the suit land. He did not have the plans in court. He had not processed the title deeds for the 85 IDPs.
21. When he entered into the sale agreement with the Defendant in 1993 the land was vacant. He denied giving the Defendant possession and explained that the caretaker called Robert Babu had been his employee from 1995 and was not employed by the Defendant. He stated that he visited the land every 3 to 6 months and was last there in April, 2017. He received some grass the previous week from the caretaker. He reiterated that he only received the payment of Kshs. 50,000/= from the Defendant.
22. On re-examination he stated that after being issued a title deed he did not receive any communication from the Defendant indicating her willingness to complete the payment. He denied authoring the acknowledgment of payments included in the Defendant's documents. He maintained that the Court of Appeal was clear in its judgment that he was to retain 16 acres of the suit land. He had never seen the banker's cheque that was among the Defendant's documents, and pointed out that there was no acknowledgment of receipt of the funds or letter forwarding that cheque. The Plaintiff closed his case at that point.
23. Subsequently the Defendant filed an application to bar the firm of Owang' & Associates from representing the Plaintiff in this suit. The application was argued and the court delivered its ruling on 23/01/2020. The court dismissed the application with costs. The suit was transferred to the Nanyuki Environment and Land Court in August, 2021.
24. The Defendant's case was heard by this court on 16/02/2022 when she gave evidence. She stated that in March, 1993 the Managing Director of the Agricultural Finance Corporation (AFC) referred her to the AFC offices in Nanyuki regarding the Plaintiff's plots which were being sold over an unpaid loan facility. She visited the AFC offices in Nanyuki and was taken to the Plaintiff's farm L.R. No. 6324/8 where she met the Plaintiff. The Plaintiff informed her that he wished to relocate from Nanyuki to Ongata Rongai or Naivasha and was therefore selling plot No. 90 measuring 8 acres as well as Plot Nos. 91 and 92 each measuring 2 acres. The Plaintiff explained that the suit land had become hostile and unsafe for him because the people he sold plots to had not been issued titles for their land.
25. The Defendant explained that she was aware that the Plaintiff relocated to Ongata Rongai through the facilitation of the sum of Kshs. 200,000/= which she paid as a deposit towards the purchase of the three plots. She claimed that the Plaintiff gave her a handwritten valuation for the 12-acre piece of land which incorporated the land, a farmhouse, a factory site, a manager's office or guest house and movable assets such as engine water pump, water pipes and fence. The Defendant confirmed that according to the Plaintiff's valuation, the value of the land was Kshs. 600,000/= at Kshs. 50,000/= per acre.
26. On or about 15/04/1993 the Plaintiff and the Defendant entered into an agreement for the sale of Plot numbers 90,91 and 92 comprised in L.R. No. 6324/8. Ole Kaparo and Mailanyi Advocates acted for the Plaintiff in the transaction. The sale agreement provided that the purchase price was Kshs. 850,000/= and that a deposit of Kshs. 200,000/= would be paid to the vendor's advocate to hold as stakeholder. The agreement incorporated the Law Society conditions of sale and stipulated the completion date as 14/07/1993.
27. At the time the parties entered into the sale agreement, the whole parcel of land being L.R. No. 6324/8 measuring 512 acres was registered in the joint names of the Plaintiff and George Wamai Hinga (deceased), with each of them occupying 256 acres. The Defendant stated that she was aware that



- before the land was sub-divided, the Plaintiff begun selling portions of his land and engaged Kamwere & Associates Surveyors to subdivide the land.
28. The Defendant arranged through Mwangi Kariuki & Co. Advocates to forward part of the purchase price to the Plaintiff's advocates, Ole Kaparo and Mailanyi Advocates to hold as stakeholder pending completion of the transaction in accordance with the terms of the agreement for sale.
 29. Ole Kaparo and Mailanyi Advocates wrote to her advocates on 28/07/1993 vide which they rejected to have the monies held on a stakeholder basis pending completion and instead insisted that the money was to be used for the sub-division of the land and the processing of the title deed. In the Defendant's view, this was contrary to the initial agreement whose terms were that the balance of the purchase price would be paid within 14 days of the registration of the transfer in favour of the Defendant in line with the special conditions in the sale agreement.
 30. The Defendant stated that at that time she had paid to the Plaintiff Kshs. 200,000/= vide banker's cheque no. 220 337 dated 18/06/1993 and a further sum of Kshs. 50,000/= through Kirundi & Co. Advocates. She stated that the Plaintiff continued to receive cash installments from her and Mr. Geoffrey Kamau. On 20/03/1995 while in the offices of Kirundi & Co. Advocates, Nyambura Advocate, an associate in that firm asked the Plaintiff to tabulate all the payments he had received from the Defendant towards the sale which he did.
 31. The Defendant emphasised that the Plaintiff continued to receive installments towards the purchase price even after the completion period had passed and that he received a total of Kshs. 630,000/=. She stated that their continuing to transact and negotiate over the sale transaction after the completion date had passed implied that the completion was extended by conduct of the parties.
 32. While she was engaging the Plaintiff over the completion of their transaction, a dispute arose between the Plaintiff and the persons who were in occupation of his land which culminated in the filing of Meru HCCC No. 411 of 1993. She was not a party to that suit which went all the way to the Court of Appeal. The land was sub-divided on or about 21/11/2000 and the Plaintiff's portion was registered as L.R. No. 6234/10. Vide the judgment dated 22/01/2014, the Court of Appeal reversed the decision of the High Court and ordered that the Plaintiff was to put in possession the persons who had bought land from him and that 16 acres of land where the Plaintiff had put up his house was to be registered in his name. The Defendant pointed out that the Plot numbers 90, 91 and 92 formed part of the 16 acres.
 33. The Defendant believed that the doctrine of constructive trust was applicable in this case and that the Plaintiff is prevented from acting in an unconscionable manner by defeating the common intention of the parties. She maintained that having received the purchase price from her, the Plaintiff was estopped from reneging on the agreement for sale.
 34. The Defendant averred that she had been in constructive possession of the suit land as a bona fide purchaser for value and that the Plaintiff could not therefore claim that she was a trespasser on the land. She maintained that she had been in open, continuous, exclusive and uninterrupted occupation of the suit land from April, 1993 to date and that at no point in time did the Plaintiff ask her to vacate the land. She claimed that she had been in adverse possession of the land from 1993 and had therefore acquired title to Plots numbers 90, 91 and 92 after twelve years lapsed.
 35. She added that after the decision of the Court of Appeal, the Plaintiff kept reassuring her that he would issue a title to her in respect of Plot numbers 90, 91 and 92 comprised in L.R. No. 6234/10. On 30/04/2001, the Plaintiff wrote to her advocate then, Kirundi & Co. Advocates advising them that the sub-division of L.R. 6324/8 had been completed and that a title over this land had been issued to him on 21/11/2000.



36. The Defendant averred that she was aware that the original title over Grant no. 84982 for L.R. No. 6324/10 which was deposited with her advocates M/s Kirundi & Co. Advocates was still in their possession awaiting issuance of the title to her in respect of Plot numbers 90, 91 and 92.
37. The Defendant revisited the issue of the Plaintiff's advocates Mr. Donald Owang having been an associate at Kirundi & Co. Advocates until 2010. She averred that Mr. Owang was privy to substantial information relating to this sale transaction and had failed to disclose the apparent conflict of interest. The Defendant relied on copies of Mpesa statements indicating that she transferred funds from her account to Mr. Owang.
38. The Defendant described the Plaintiff as a person capable of gross fraud and a perennial litigant who was hell bent on dispossessing her of Plot numbers 90, 91 and 92 which she lawfully occupied and possessed. She believed that the Plaintiff had lost his right to these plots having discontinued his possession after she purchased the land from him and put her into occupation. She urged the court to grant the reliefs she seeks in her counterclaim.
39. The Defendant produced the copy of the handwritten but undated valuation of the assets, the Law Society Conditions, a copy of the sale agreement, the sub-division sketch map, the correspondence exchanged between Mwangi Kariuki & Co. Advocates and Ole Kaparo and Mailanyi Advocates dated 26th and 28th July 1993. She produced a copy of the deposit slip dated 18/06/1993 from Standard Chartered Bank Kenya Limited showing that the sum of Kshs. 200,000/= was paid into the Plaintiff's account. She also produced a copy of the acknowledgement of Kshs. 50,000/= dated 15/04/1993. She produced an undated handwritten breakdown of the payments made. She also produced an acknowledgement which appears to have been handwritten by the Plaintiff on 15/10/1995 regarding a payment of Kshs. 10,000/=.
40. The Defendant also produced the plaint and other proceedings related to the suit in Meru including the applications for consent of the LCB. She produced copies of the correspondence exchanged relating to the Meru case as well as the judgments from the Meru High Court and the Court of Appeal.
41. The Defendant produced a copy of the Plaintiff's letter dated 13/09/1993 to Kirundi & Co. Advocates, marked for the attention of Miss Nyambura Kamau requesting some payments to be made to Gichuru Mathenge & Company Advocates. The Defendant also produced letters dated 18/02/2002 and 6/01/2003 which Kirundi & Co. Advocates wrote to the Plaintiff seeking to know whether the sale transaction was still proceeding. Kirundi and Co. Advocates wrote to the Plaintiff on 8/04/1999, 3/09/1998, 15/09/1997, 26/02/1997, 5/02/1997, 22/12/1993, 31/10/1995, 29/09/1995, 24/08/1999, 25/02/2000, 19/03/1996 inquiring about the sub-division of L.R. No. 6324/8 and the issuance of titles over the land.
42. The Plaintiff wrote to Kirundi and Co. Advocates on 20/9/1999 and apologised for the delay in responding to the letters from that law firm. He clarified that he surrendered the original title issued to him on 18/03/1996 and engaged James Kamwere to undertake the survey. He stated in the letter that he was following up the proceedings with the Commissioner of Lands with a view to having a new grant issued to him.
43. The Defendant produced the letter dated 05/11/1997 informing the Plaintiff of the extension of the lease over L.R. No. 6324/8 Nanyuki. The letter sought the surrender of the titles and payment of fees in respect of the new grant. She also produced copies of the receipts issued by the Department of Lands on 11/11/1997 to the Plaintiff on payment of conveyancing fees amounting to Kshs. 16,000/= in relation to L.R. No. 6324/10 and 6324/11.



44. The Plaintiff wrote to Kirundi and Co. Advocates on 30/04/2001 confirming that the subdivision of L.R. No. 6324/8 had been completed and a title issued to him on 21/11/2000. The letter which forwarded the grant and deed plan to the advocates, was marked for the attention of Miss Kamau.
45. Kirundi and Co. Advocates wrote to Kamwere and Associates on 13/08/2015 requesting the surveyors to identify to the Defendant the beacons for plots numbers 90,91 and 92 in his survey plan and for her to be given survey plan showing the location of her plots. Kirundi and Co. Advocates wrote to Donald Owang' and Co. Advocates on 20/7/2015 regarding the sale of Plot numbers 90, 91 and 92 by the Plaintiff to the Defendant, and expressed concern that the Defendant was getting anxious and impatient. The letter was copied to Dr. Mwangi Kagiri and a query raised by the advocates as to whether the advocates should proceed to implement the judgment of the court which included the Defendant's portion since the law firm had the original title over the land.
46. The Defendant produced a copy of the letter dated 23/06/2015 which Kirundi & Co. Advocates wrote to Donald Owang' and Co. Advocates requesting to know the way forward from the Plaintiff regarding the sale of land to the Defendant. The Defendant produced a print out of her Mpesa transactions for the period running from 02/04/2011 to 26/01/2014 showing that she transferred funds to Donald Owang.
47. On cross examination, the Defendant stated that she paid the purchase price of Kshs. 850,000/= in full but was not given the completion documents. She stated that the Plaintiff continued to take money until 1996 and denied instructing an advocate to seek extension of time while maintaining that the agreement was still in force. She confirmed that Kirundi and Advocates were her lawyers in the transaction. She stated that her cause of action arose after the Court of Appeal determined the case. That is when her caretaker was chased away and she was told that she was a trespasser on the land. She claimed that she put the caretaker called Mbabu on the land and that he was still there. She did not call Mr. Mbabu to give evidence.
48. On re-examination, the Defendant reiterated that the balance of the purchase price was to be paid 14 days after registration of the transfer which to date has not been registered. She stated that after paying the initial sum of Kshs. 200,000/= in 1993 she was given possession of the land. Further, that until the Plaintiff lost the case in the Court of Appeal he had never challenged her possession of the suit land.
49. She explained that she was neither joined to the suit nor appeal because she was not part of the 85 IDPs and more importantly had no dispute with the Plaintiff regarding her ownership of the suit land. She stated that Mr. Owang' advocate who was working for Kirundi and Co. Advocates advised her that there was no need for her to be joined to the suit. She stated that Mr. Owang' worked for Kirundi & Co Advocates from 1993 until 2010 and was involved in the suit before the Meru High Court and in the subsequent appeal since he represented the Plaintiff. She emphasised that up until 2015 her advocates Kirundi and Co. Advocates were still communicating with the Plaintiff regarding the excision of her 12 acres and giving her a title over the land. She confirmed that she was never served with the notice of completion or termination of contract. She continued dealing with Mr. Owang' after he left Kirundi And Co. Advocates
50. Parties filed submissions which the court has considered. The Plaintiff admitted in his submissions that he entered into an agreement to sell Plots numbers 90, 91 and 92 which were to be excised from L.R. No. 6324/10 to the Defendant at the agreed consideration of Kshs. 850,000/= out of which a deposit of Kshs. 200,000/= was paid to his advocates Ole Kaparo and Mailanyi Advocates to hold as stakeholder.



51. The Plaintiff submitted that under the special conditions in the agreement time was of essence to the contract. He submitted that the Defendant did not pay the balance of the purchase price on or before the completion date. Further, that the Defendant did not avail any documentary evidence to show that she paid the balance of the purchase price. The Plaintiff relied on the letter dated 26/07/1993 vide which Mwangi Kariuki and Co. Advocates requested the Plaintiff's advocates to draft a fresh agreement since the one dated 16/04/1993 had already expired. In the Plaintiff's view, this confirmed that the Defendant had accepted the fact that the sale agreement dated 15/04/1993 had expired or had been rendered unenforceable. The Plaintiff submitted that the sum of Kshs. 200,000/= mentioned in clause 3 of the sale agreement which was to be held by his advocate as stakeholder was never released to his advocates. This according to the Plaintiff confirms that by the completion date of 14/07/1993 the Defendant had not paid a single penny to the Plaintiff towards the purchase of the plot.
52. The Plaintiff submitted that his advocates wrote to the Defendant's advocates on 28/07/1993 informing them that the Plaintiff was not willing to proceed with the sale transaction on the conditions set and the firm was therefore unable to draft a fresh sale agreement. To the Plaintiff, this brought the sale to an end. The Plaintiff further argued that if the Defendant felt aggrieved or thought he had breached any of the terms of the agreement dated 15/04/1993 then she should have issued a notice to him to complete pursuant to clause 7 (b) of the Law Society Conditions. Further, the Plaintiff contended that the Defendant cannot rely on special condition number 3 of the sale agreement which stated that the balance of the purchase price would be paid 14 days after registration of the transfer in favour of the purchaser because there was no agreement to be enforced after the one dated April 1993 lapsed without parties entering into a fresh agreement.
53. The Plaintiff maintained that the Defendant or her agents had never been in occupation of the suit plot and that the Defendant's first attempt to forcefully take possession of the plot through her agents was in March, 2016 which is what prompted him to file his case. He argued that the sale agreement dated 15/04/1993 did not envisage the Defendant taking possession of the suit plot upon execution of the sale agreement. Moreover, that the sale was rendered void for all purposes due to the lack of consent from the LCB.
54. The Plaintiff discredited the Plaintiff's allegation that she paid the purchase price and maintained that he did not receive the sums indicated in the documents which the Defendant produced. The Plaintiff pointed out that those documents were neither executed by the parties nor were they witnessed. He wondered why the Defendant opted to remit the sums alleged directly to him when both parties in the sale transaction were represented by advocates. He added that this is the reason why the Defendant opted not to pursue her claim based on the sale agreement dated 15/04/1993 and instead relied on a claim on adverse possession.
55. The Plaintiff submitted that the Defendant's claim for adverse possession to the suit plot was untenable because she had never been in occupation of the suit plot. He maintained that since the Defendant breached the terms of the sale agreement by failing to pay the agreed purchase price on or before the completion date, she did not acquire any interest which would have warranted her being given possession of the land.
56. The Plaintiff submitted that when the Defendant first attempted to occupy the suit land and invaded it on 16/03/2016, it prompted him to file an application seeking to restrain the Defendant from trespassing onto the suit land. He added that the Defendant threatened to harm the Plaintiff's caretaker who was on site if he did not give the Defendant's agents vacant possession of the suit land.
57. The Plaintiff submitted that the Defendant has never been in actual, physical or constructive possession of the suit property while pointing out that for a claim for adverse possession to succeed, a claimant



- must have been in actual possession of the land for a continuous period of 12 years without the consent of the owner. The Plaintiff contended that if the Defendant's alleged possession of the suit plot was with his consent, then this would defeat a claim based on adverse possession. The Plaintiff argued that one cannot acquire interest over land by a way of adverse possession through paying the purchase price.
58. The Plaintiff submitted that the Defendant needed to show that she had a right to possession hostile to that of the owner and that she had been in actual possession which must be open, notorious, continuous and without the consent of the owner. The Plaintiff argued that there was no evidence of the Defendant having dispossessed the Plaintiff of the suit property. The Plaintiff added that he had in fact sold a few acres of the suit plots to third parties and that there was no evidence to show that the Defendant objected to the sale of those portions excised from the suit property.
 59. The Plaintiff relied on the Court of Appeal decision in *Ruth Wangari Kanyagia v Josphine Muthoni Kinyanjui* [2017] eKLR on the fact that the onus is on the person claiming adverse possession to prove that they had used the land which they claim as of right without force or secrecy. Further, that the Plaintiff must show that the owner had the means of knowing of the actual or constructive possession.
 60. The Plaintiff argued that the Defendant did not adduce evidence to show how she had utilized the suit plot either through farming or any other developments which would have been adverse to his interests. He added that the only hostility which the Defendant displayed through her agents was on 16/03/2016. The Plaintiff relied on the decision in *M'Mbaoni M'Thaara v James Mbaka* [2017] eKLR in support of the contention that a claim for the adverse possession cannot coexist with a claim grounded on a purchaser's interest.
 61. In conclusion, the Plaintiff submitted that the case in the Meru High Court and the judgment delivered by the Court of Appeal had nothing to do with the Defendant or the suit plot, rather that it dealt with parties who had purchased various portions of plots from the Plaintiff. He urged that that suit was not relevant to this claim which is why the Defendant was not joined as a party to the case before the Meru High Court. The Plaintiff urged the court to dismiss the Defendant's claim for adverse possession and her counterclaim and for judgment to be entered in his favour of the Plaintiff as sought in the plaint.
 62. In her submissions, the Defendant summarised two issues for determination in this suit. That is, whether the Defendant is the owner of Plots numbers 90, 91 and 92 situated within L.R. No. 6324/10 and whether the Plaintiff is entitled to the reliefs sought. The Defendant submitted that she had produced documents giving a chronology of the events as well as the communication between her and the Plaintiff in relation to the purchase of the plots which was uncontroverted.
 63. She submitted that she paid to the Plaintiff Kshs. 200,000/= and a further sum of Kshs. 50,000/= in accordance with the sale agreement. She submitted that she continued to pay the purchase price through installments even after the completion period passed because the parties had agreed that the Plaintiff required the money to undertake the subdivision of the L.R. No. 6324/10. To facilitate this transaction, both the Defendant and the Plaintiff opted to use one advocate Kirundi and Co. Advocates. She added that the completion date lapsed without the Plaintiff obtaining the completion documents and that by then she had already taken possession of the suit land. She urged that she continued to make payments to the Plaintiff totaling Kshs. 630,000/= as demonstrated in the bundle of documents.
 64. The Defendant relied on the Plaintiff's letter dated 30/04/2001 addressed to Kirundi and Co. Advocates terming it an admission while insisting that the Plaintiff failed to transfer the suit property to her despite numerous letters by the advocates requesting him to complete the transaction. She submitted that at no time did the Plaintiff deny that she was entitled to the suit property or that he had not received payment. She pointed out that long after the completion period she continued to



- communicate with the Plaintiff and the Plaintiff continued to receive payment from her as they awaited the completion of the subdivision process.
65. She stated that she relied on the reassurance which Mr. Owang', the Plaintiff's advocate who filed the Meru suit, gave her that she was not to be joined to that suit because there was no dispute as to her ownership of the suit land. That Mr. Owang' assured her that as soon as the Plaintiff succeeded on the appeal he would embark on transferring the suit property to her. That was the basis upon which she continued to make payment to the Plaintiff. She relied on the payments which she made to Mr. Owang' and stated that they partly financed the suit and also paid the advocates disbursements.
 66. The Defendant submitted that it is only when he lost the appeal in 2014 that the Plaintiff turned against her and filed this suit to evict her. She argued that this cause of action lies in trespass, it is in admission that she was in actual possession of the suit property. The Defendant submitted that the Plaintiff having received the purchase price from her and having put her in possession of the suit property, the Plaintiff is estopped from reneging on the agreement for sale. Further, that she was in constructive possession of the suit property as a bona fide purchaser for value and the Plaintiff is prevented from trespassing onto the land which she claims to have been in open, continuous, exclusive and interrupted occupation of from April 1993 to date.
 67. She maintained that she has continued to occupy and engage in dealings on the suit land which was clearly demarcated without the Plaintiff's interruptions and with his knowledge of her possession of the suit property. She claimed that she has been in peaceful, open and continuous actual visible exclusive and notorious use of the suit land for nearly 30 years. The Defendant relied on the decision of *Mtana Lewa v Kabindi Ngala Mwangandi* [2015] eKLR on the requisite adverse possession as well as the decision in *Celina Muthoni Kitbinji v Safya Binti Swaleh & Others* [2018] eKLR. The Defendant denied that the Plaintiff was entitled to the reliefs sought and urged the court to dismiss his claim.
 68. The issue for determination is whether the court should grant the orders sought in the plaint or those sought in the counterclaim. The Defendant's counterclaim is pegged on both the sale transaction and adverse possession. The Defendant did not adduce evidence to confirm that she has been in occupation of the land and the duration of time when she has had possession. From the evidence of both the Plaintiff and the Defendant it is not clear whose caretaker is on the land. Both parties claim that the caretaker called Babu or Mbaabu is theirs. The caretaker was not called to give evidence. Neither party produced evidence of the payment made to the caretaker or any other document to prove that they had hired him to take of the land on their behalf, this would confirm who has actual possession of the land. The Defendant did not produce any evidence to show what developments or crops she had planted on the land from 1993 up to 2022 when she gave evidence. It is difficult to believe that she could have been on the land for almost 30 years without doing anything on the land. It is not possible to ascertain who is in possession of the land. The Defendant failed to prove the ingredients for a claim for adverse possession.
 69. It is not in dispute that on 15/4/1993 the Plaintiff entered into a sale agreement with the Defendant for the sale of Plot numbers 90, 91 and 92 comprised in L.R. No. 6324/8 at the agreed consideration of Kshs. 850,000/=. The agreement which both parties executed acknowledged that the sum of Kshs. 200,000/= had been paid to the vendor's advocates as stakeholder and the balance of the purchase price would be paid fourteen days after the registration of the transfer in favour of the purchaser. The agreement stated that time was of the essence.
 70. At the time the parties entered into the agreement the land was jointly held by the Plaintiff and a third party. The Plaintiff confirmed in his evidence that the subdivision of the land into two portions was done between 1996 and 1999. The Plaintiff's letter to Kirundi and Company Advocates of 20/9/1999



confirms this position. The correspondence exchanged through Kirundi and Company Advocates who at some point acted for both parties confirms that the subdivision of the whole parcel of land for the Plaintiff to obtain a title over his share of 256 acres took more than seven years from the date the parties executed the sale agreement in 1993.

71. The Plaintiff obtained the title over his land being L.R. No. 6324/10 on 21/11/2000 and forwarded it to Kirundi and Co. Advocates vide his letter dated 30/4/2001. The Defendant testified that she was reassured by the Plaintiff and his advocate Mr. Owang that as soon as the case which the Plaintiff filed against the 86 IDPs was concluded he would transfer the 12 acres she had bought to her. The engagement of the parties over this long period shows that time ceased to be of essence for the sale transaction. Neither party served a completion notice on the other party.
72. The Plaintiff testified that he sold his portion of land to the 86 IDPs in 1982 leaving 16 acres. He gave them possession but did not process their titles. When he sued them in 1993 they counterclaimed for the transfer of the purchased plots to their names. This was the gist of the holding of the Court of Appeal in Nyeri [*Civil Appeal No 26 and 27 of 2011*](#) delivered on 22/1/2014. There is no evidence that the Plaintiff complied with those court orders which this court notes were made almost eight years ago. This aspect speaks to the conduct of the Plaintiff. It was improper for the Plaintiff to indicate in his submissions that he had in fact sold a few acres of the suit plots to third parties without the Defendant's objection. This should have been brought out during the trial but not in the submissions.
73. The Plaintiff argued that the sale stood terminated after his advocates declined to prepare a fresh agreement as communicated in the letter dated 28/7/1993. The court is satisfied that the parties continued with the sale transaction and the Plaintiff received payments from the Plaintiff long after the completion date had passed. It is noteworthy that the Plaintiff did not produce any documents in evidence and instead referred to the documents which the Defendant produced.
74. What the court understands to be the import of the letter dated 28/7/1993 was that the Plaintiff was not agreeable to have the sum of Kshs. 200,000/= held by his advocates as stakeholder because he wished to utilise the money to procure separate titles over the land after subdivision since he held the land jointly with a third party. There is no indication that that sum was refunded to the Defendant. The court is satisfied that that sum was paid towards the purchase price. The Plaintiff admitted that he was paid a sum of Kshs. 50,000/=.
75. The Defendant relied on the handwritten breakdown of payments dated 20/3/95. Unfortunately, it was not signed by the parties. It would have been useful for the Defendant to obtain a formal acknowledgement of the payments she made to the Plaintiff. There are inconsistencies in the Defendant's evidence on the total sum she paid. She claims to have paid the full sum of Kshs. 850,000/=, then claims she paid Kshs. 630,000/=.
76. It is not clear what the money the Defendant sent to Donald Owang' advocate through Mpesa related to. The court notes that a ruling was made on 23/1/2020 in respect of the Defendant's application seeking to bar Donald Owang' advocate from representing the Plaintiff in this suit.
77. The evidence adduced suggest that the Defendant may have made many payments to the Plaintiff based on trust without any formal acknowledgment. Indeed, the Plaintiff disputed the payments and discredited the handwritten acknowledgement and breakdown which the Defendant produced as evidence of payment including the handwritten acknowledgement that appears to have been signed by the Plaintiff on 5/10/95. It is not clear why the firm of Kirundi and Co. Advocates who were representing the parties did not write any letters confirming the payments which the Plaintiff had received from the Defendant. No witness was called from the firm of Kirundi and Co. Advocates to shed light on the sum paid by the Defendant for the suit land.



78. The Defendant produced a payment voucher from Standard Chartered Bank Limited dated 18/6/93 confirming that the sum of Kshs. 200,000/= was paid into the Plaintiff's account. The Plaintiff denied knowledge of this sum and pointed out that it was not included in the handwritten breakdown dated 20/3/95. The Defendant did not clarify this. In the court's view, the Defendant only proved payment of Kshs. 450,000/= towards the purchase price. This sum is made up of the deposit of Kshs. 200,000/= paid to the purchaser's advocate to hold as stakeholder which was acknowledged in the sale agreement, Kshs. 50,000/= admitted by the Defendant and the sum of Kshs. 200,000/= paid into the Plaintiff's account on 18/6/1993. The purchase price was Kshs. 850,000/= for the 12 acres. Having proved payment of Kshs. 450,000/= only, the Defendant is entitled to half the suit land measuring 6 acres.
79. The Plaintiff's suit is dismissed with costs to the Defendant.
80. The Defendant partially succeeds in her counterclaim to the extent that she is entitled to half the suit land measuring 6 acres comprised in L.R. No. 6324/10. The Defendant is awarded the costs of the counterclaim.
81. The Plaintiff is ordered to transfer 6 acres from the land comprised in L.R. No. 6324/10 to the Defendant within 90 days of the date of this judgment failing which the Deputy Registrar of the court will execute all the relevant documents to facilitate the transfer of the 6 acres to the Defendant.

DELIVERED VIRTUALLY AT NANYUKI THIS 28TH DAY OF APRIL 2022.

K. BOR

JUDGE

In the presence of: -

Mr. Donald Owang for the Plaintiff

Mrs. Salome Beacco for the Defendant

Ms. Stella Gakii- Court Assistant

